

IT 00-0097-GIL 12/29/2000 PUBLIC LAW 86-272/NEXUS
WITHHOLDING - OTHER RULINGS

General Information Letter: General guidance for determination of whether taxpayer performing services in Illinois has nexus for income tax purposes and whether taxpayer is required to withhold Illinois income tax from wages paid to employees.

December 29, 2000

Dear:

This is in response to your letter dated September 6, 2000 in which you request a letter ruling. The following is in response to your questions with respect to Illinois income tax. Your questions with respect to sales and use tax have been referred to the Sales Tax Division and will be addressed by a separate ruling. The nature of your letter and the information provided with respect to Illinois income tax require that we respond with a General Information Letter (GIL). A GIL is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 86 Ill. Adm. Code 1200.120(b) and (c), which may be viewed on our website at <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

Your letter states as follows:

The Illinois Department of Revenue's opinion is requested in regard to the Illinois sales and use tax treatment of the following six examples:

Example 1

Company #1 has a grain bin that needs servicing in Illinois. Company A's crane and operator drive to the site in a truck-mounted crane and set up in the area directed. Crane operator and crane lift several pieces to the top of the grain elevator. These pieces were rigged for lifting by Company #1's personnel. Crane and operator would fold up and return to Wisconsin.

Example 2

Company #2 erects cell phone towers. Company A's crane and operator, along with three tractors, trailers and drivers to haul counterweight for the crane, travel from Wisconsin to tower site in Illinois. Company A's operator and drivers set up crane and ready it for the pick(s). Company #2's personnel rig tower sections. Company A's crane and operator lifts pieces of tower section and holds them in place until they can be secured by Company #2's riggers. Company A's crane, operator, tractors, trailers and drivers fold up and return to Wisconsin at the completion of the job.

Example 3

Company #3 builds steel structures. Company A's crane is trailered to the site in Illinois from Wisconsin. Crane is set up on site, but is mobile about the job site as the crane is described as a mobile rough terrain crane. Company A's operator makes daily trips to the site for a two-week period, crane remains on site. Crane and operator perform the following functions while on site:

- Unloading beams and trusses from various carriers' trailers
- Hoisting beams in place

- Lifting various supplies to the top of the structure that are used by Company #3's riggers
 - Hoisting trusses in place
- All rigging is performed by Company #3's personnel.

Example 4

Company #4 owns equipment that needs to be unloaded from a barge on the Mississippi River. Company A's crane, operator, tractors, trailers and drivers (to haul counterweight) are dispatched to the Illinois site from Wisconsin. Company A's crane is set up and readied for the pick by Company A's operator and crew. Company A's personnel rig the piece. The pick is performed and then the crane is folded up and returned to Wisconsin.

Example 5

Company #5 builds apartment complexes. Company A's mobile crane and operator are dispatched to the site in Illinois and set up by the operator. Crane and operator lift and set trusses at the direction of Company #5 personnel. Company A's crane and operator fold up and return to Wisconsin after completion of the job.

Example 6

Company #6 builds pre-fabricated houses. A customer of Company #6 wishes to have a house set on his property in Illinois. Company #6 contracts with Company A to set the house. Company A's mobile crane, operator and tractors, trailers and drivers, carrying two loads of counterweight, are dispatched to home site in Illinois from Wisconsin. The crane is readied at the site by Company A's personnel. The house arrives on a third party carrier's trailer. The house is set by Company A's crane and operator with Company #6's personnel doing the rigging. After the house is set, crane is folded up and returned to Wisconsin.

Questions

1. For each of the above Examples 1-6, are the charges by Company A to its customer (for performing the activities described) subject to Illinois sales or use tax? If yes, what law, regulations, etc., apply to these activities?
2. Is Company A liable for sales and use tax on any of the trucks, trailers, tractors and equipment (e.g. cranes) it uses in performing these activities in Illinois? If yes, what law, regulations, etc. apply? Also, if the answer is yes, would Illinois also allow credit for Wisconsin sales or use taxes properly paid by Company A? Would Illinois also allow credit for Wisconsin local sales and use taxes (e.g. county tax) properly paid?
3. A crane used in Illinois in Examples #1-6 was purchased in Wisconsin without tax because it was intended to be used solely for rental purposes. Wisconsin sales tax is charged on the rent of the crane in Wisconsin. If this crane is subject to Illinois use tax, will credit be allowed for the Wisconsin sales tax charged by Company A on the rent of the crane in Wisconsin? Also, if the crane is subject to Illinois use tax, is

the use tax computed on the original cost of the crane, fair market value at the time of use in Illinois, or some other amount?

4. Do the activities by Company A create nexus in Illinois for 1) sales and use taxes, and 2) corporation taxes?
5. Is Company A required to withhold Illinois income taxes from the wages it pays to its employees for working in Illinois as described in Examples 1-6?

RULING

I. Illinois income tax nexus

The determination of whether a taxpayer has nexus with Illinois is extremely fact-specific. Therefore, the Department does not issue rulings regarding whether a taxpayer has nexus with the State. Such determination can only be made in the context of an audit where all relevant facts and information may be available. However, we can provide general information regarding nexus with Illinois.

The Due Process and Commerce Clauses of the United States Constitution limit the power of states to tax foreign corporations. The Due Process Clause requires some minimum connection between a state and the person, property, or transaction it seeks to tax. (Quill Corp. v. North Dakota, 504 U.S. 298, 112 S.Ct. 1904 (1992)) The Commerce Clause requires that the state's tax must be applied only to an activity having a substantial nexus with state. (Id.) Where any part of a foreign corporation's income is allocable to Illinois in accordance with the provisions of Article 3 of the Illinois Income Tax Act ("the IITA" ; 35 ILCS 5/301-304), Illinois can demonstrate the connection or nexus necessary to subject such corporation to tax.

IITA section 304 provides for tax years ending on or after December 31, 2000, that the apportionment factor of nonresidents deriving business income from Illinois and one or more other states shall be equal to the sales factor. Section 304(a)(3)(A) defines the sales factor as a fraction, the numerator of which is the total sales of the person in Illinois during the taxable year, and the denominator of which is the total sales of the person everywhere.

Illinois Income Tax Regulations section 100.3370(a)(1) states that the term "sales" means all gross receipts derived by the person from transactions and activity in the regular course of its trade or business. In the case of a person engaged in providing services, the same Regulations provide that "sales" includes the gross receipts from the performance of such services, including fees, commissions and similar items. Regulations section 100.3370(c)(3) provides that gross receipts with respect to sales other than sales of tangible personal property must be included in the numerator of the sales factor if (1) the income producing activity which gave rise to the receipts is performed wholly in Illinois, or (2) the income producing activity is performed both in and outside Illinois and the greater portion of the income producing activity is performed in Illinois based on costs of performance. "Income producing activity" is here defined to include the rendering by employees of personal services in the regular course of business, or the utilization of tangible and intangible property by the person in performing a

service. The term "costs of performance" is defined as the direct costs of the person determined in a manner consistent with generally accepted accounting principles.

Based upon the information provided with respect to Examples 1-6, it appears that a portion of Company A's income may be allocable to Illinois in accordance with the provisions of Article 3 of the IITA. Thus, Company A may be subject to Illinois income tax.

II. Illinois income tax withholding

Section 701 of the IITA sets forth the requirement for withholding Illinois income tax, in part, as follows:

- (a) In General. Every employer maintaining an office or transacting business within this State and required under the provisions of the Internal Revenue Code to withhold a tax on:
 - (1) compensation paid in this state (as determined under Section 304(a)(2)(B) to an individual; or
 - (2) payments described in subsection (b) shall deduct and withhold from such compensation for each payroll period (as defined in Section 3401 of the Internal Revenue Code) an amount equal to the amount by which such individual's compensation exceeds the proportionate part of this withholding exemption (computed as provided in Section 702) attributable to the payroll period for which such compensation is payable multiplied by a percentage equal to the percentage tax rate for individuals provided in subsection (b) for Section 201.
- (b) Payment to Residents. Any payment (including compensation) to a resident by a payor maintaining an office or transacting business within this State and on which withholding of tax is required under the provisions of the Internal Revenue Code shall be deemed to be compensation paid in this State by an employer to an employee for the purposes of Article 7 and Section 601(b)(1) to the extent such payment is included in the recipient's base income and not subjected to withholding by another state.

Illinois Income Tax Regulations section 100.7020 states that the phrase "employer transacting business within this State" includes:

Any employer having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent or other representative operating within this State under the authority of the employer or its subsidiary, irrespective of whether such place of business or agent or other representative is located here permanently or temporarily, or whether such employer or subsidiary is licensed to do business in this State.

It does not matter that an agent may engage in business on his own account in other transactions, nor that such agent may act as agent for other persons in other transactions, nor that he is not an employee but is an independent contractor acting as agent. The term "agent" is broader than the term "employee." "Agent" includes anyone acting under the principal's authority in an agency capacity.

Regulations section 100.7010(a) sets forth general rules applicable to whether compensation is paid in Illinois. That section provides in part:

Compensation is paid in this State if:

- A) The individual's service is localized in this State because it is performed entirely within this State.
- B) The individual's service is localized in this State although it is performed both within and without this State, because the service performed without this State is incidental to the individual's service performed within this State; or
- C) The individual's service is not localized in any state but some of the service is performed within this State and either; the base of operations, or if there is not a base of operations, the place from which the service is directed or controlled is within this State, or the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.

Regulations 100.7010(c) provides rules with respect to whether an individual's service is localized in Illinois. Section 100.7010(d) provides rules regarding an individual's base of operations. Section 100.7010(e) provides rules regarding the determination of an individual's place of direction or control.

Application of the above rules in this case requires Company A to withhold Illinois income tax if (1) it is an employer transacting business in Illinois, and (2) compensation paid to the employees performing services in Examples 1-6 is considered compensation paid in Illinois. For your convenience please find enclosed relevant sections of Illinois Income Tax Regulations Subpart Q.

As stated above, this is a GIL. Accordingly, it does not constitute a statement of policy that applies, interprets or prescribes the tax laws, and it is not binding on the Department. If you are not under audit and wish to obtain a binding private letter ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of 86 Ill. Adm. Code 1200.110(b).

I hope this information is helpful. If you have further questions concerning this GIL you may contact Legal Services at (217) 782-7055. If you have further questions related to the Illinois income tax laws, visit our website at www.revenue.state.il.us or contact the Department's Taxpayer Information Division at (217) 782-3336.

Sincerely,

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